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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFREY CRAIG BUMGARDNER, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWIN C. WALKER
COUNSEL FOR PETITIONER
P. O. Box 127
Raleigh, North Carolina 27602
(919) 832-2610

January 11, 1984

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFREY CRAIG BUMGARDNER, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes the Petitioner, by and through his undersigned court-appointed attorney and moves the Court by leave to proceed on his Petition for Writ of Certiorari, attached hereto, in forma pauperis, pursuant to Rule 46, Supreme Court Rules. Petitioner applied to both the United States District Court for the Eastern District of North Carolina and to the Fourth Circuit Court of Appeals to proceed in forma pauperis. Both requests were granted and Petitioner was appointed an attorney pursuant to the Criminal Justice Act of 1964.

Therefore, Petitioner contends that he is indigent and qualifies to proceed in forma pauperis.

Respectfully submitted this the 11th day of January, 1984.

Edwin C. Walker

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE FOURTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: JEFFREY CRAIG BUMGARDNER, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on September 9, 1983.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals (App. 1) is reported at 717 F. 2d 1481 (1983). The decisions of the District Court below were not published.

JURISDICTION

The Judgment of the Fourth Circuit Court of Appeals was entered on September 9, 1983. The petition for rehearing was denied November 14, 1983. (App. 27). Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, §1254 (1).

QUESTIONS PRESENTED

I. Whether Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit, which requires consolidation of briefs and oral argument, violated Petitioner's rights to due process and adequate representation of counsel.

II. Whether Petitioner was denied an adequate hearing to determine whether jury contamination denied him the right to a fair trial.

III. Whether the District Court violated Rule 605 of the Federal Rules of Evidence by testifying as a witness at the jury hearing.

STATUTORY PROVISIONS INVOLVED

1. Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit:

> 19. Consolidated Cases and Briefs.
> Related appeals or petitions for review will be consolidated in the Office of the Clerk, with notice to all parties, at the time a briefing schedule is established. One brief shall be permitted per side, including parties permitted to intervene, in all cases consolidated by court order, unless leave to the contrary is granted upon good cause shown. In consolidated cases lead counsel shall be selected by the attorneys on each side and that person's identity made known in writing to the Clerk within seven (7) days of the date of the order of consolidation. In the absence of an agreement by counsel, the Clerk shall designate lead counsel. The individual so designed shall be responsible for the coordination, preparation and filing of the brief and appendix.

2. Rule 605 of the Federal Rules of Evidence:

> RULE 605. Competency of Judge as Witness
>
> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

STATEMENT OF THE CASE

Petitioner was charged in a Superseding Indictment filed in the Eastern District of North Carolina with one count of conspiring to possess cocaine with the intent to manufacture and distribute it in violation of 21 U.S.C. §841 (a)(1) and with one count of unlawfully using a communication facility in furtherance of the conspiracy in violation of 21 U.S.C. §843 (b). Nine co-defendants also were charged with various criminal offenses. The only evidence introduced against Petitioner was tapes of certain telephone conversations in which Petitioner was an alleged participant. After a jury trial, Petitioner was convicted on both counts. Petitioner was sentenced to five years imprisonment on the conspiracy charge and to four years imprisonment on the communication facility charge. The four years is to run concurrent with the five years and all of the imprisonment was suspended except for six months.

On September 30, 1982, a hearing was held by the District Court to inquire into allegations that the jury had been contaminated by the activities of the F.B.I. during the trial. Judge W. Earl Britt, Juror Deaton, and several F.B.I. agents testified at the hearing. On November, 8, 1982, Petitioner's motion for a new trial based on jury contamination was denied. (App. 31)

On October 13, 1982, Petitioner filed his notice of appeal. On October 18, 1982, the Fourth Circuit Court of Appeals consolidated Petitioner's case with those of his five co-Defendants for purposes of briefing and oral argument.

(App. 29) On September 9, 1983, the Fourth Circuit Court of Appeals affirmed Petitioner's conviction. (App. 1) On November 14, 1983, Petitioner's motion for a rehearing was denied. (App. 27)

REASONS FOR GRANTING THE WRIT

I. Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit, which requires consolidation of briefs and oral argument, violated Petitioner's rights to due process and adequate representation of counsel.

Pursuant to Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit, Petitioner's appeal was consolidated for purposes of briefing and argument with the appeals of his five co-defendants. One brief totaling seventy-five (75) pages was permitted by the Fourth Circuit. Because of the time limits, the various issues were divided among counsel for the six defendants and all material was sent to the lead counsel in Florida for the assembling of the consolidated brief. When the material from each counsel was combined, it constituted a brief totaling one hundred twenty-eight (128) pages. To comply with the Fourth Circuit's order, lead counsel transformed this material into a seventy-two (72) page brief. During this process lead counsel omitted Petitioner's argument that the District Court erred in failing to grant Petitioner's motion for acquittal at the close of all of the evidence. This omission occurred without either the permission or knowledge of Petitioner's counsel. Both briefs were sent to the Fourth Circuit along with a motion for leave to file the 128-page brief. This motion was denied. Petitioner moved for reconsideration of

the motion on the specific grounds that one of his arguments had been omitted without his knowledge. This motion was also denied.

The Fourth Circuit is the only circuit that requires consolidation of briefs. The imposition of Rule 19 denied Petitioner his rights to due process and to adequate representation because it denied him the opportunity to raise a non-frivolous argument on appeal. A writ of certiorari should be issued so that this Court can consider the issue of whether it is a deprivation of due process and adequate representation to routinely consolidate appeals thereby denying a petitioner the opportunity to raise all of his arguments on appeal.

II. Petitioner was denied an adequate hearing to determine whether jury contamination denied him the right to a fair trial.

As the jury exited the courthouse, during the second week of the trial, an agent of the Federal Bureau of Investigation, sitting in a parked car in front of the courthouse, focused a 35mm camera with a telephoto lens on members of the jury. The agent was attempting to photograph two suspected drug dealers who had been called as witnesses during the trial proceedings that day. Attempting to get the camera in focus, the agent pointed the camera on every person that exited the courthouse and actually photographed one of the defendants and the prosecuting Assistant United States Attorney during this process. Several members of the jury noticed the agent pointing the camera at them and became quite concerned. Juror Bryant Deaton walked to the rear of the agent's automobile, obtained the license plate number, immediately returned to the courthouse and reported the

incident to the presiding judge. The court, perceiving the incident as one in which Juror Deaton expressed some degree of fear for his safety, informed him that the court was concerned about this matter also and would look into it immediately.

When Juror Deaton arrived at the courthouse the next morning, he had a general conversation with the other members of the jury and advised them that he had reported the episode and given the license plate number to the presiding judge. Shortly thereafter, Juror Deaton was called to the trial judge's chambers and informed by the court that the identity of the photographer had been determined and that the matter had been taken care of and should be of no further concern to him. The following day the jury retired to begin their deliberations, returning a verdict in the late afternoon. After the verdict was taken by the court, Juror Deaton asked the court to explain the circumstances surrounding the picture-taking incident. He was advised again that the court was not at liberty to discuss the matter at that time, but would do so at a later date.

On September 30, 1982, the District Court held a hearing to determine what effect the F.B.I.'s actions had on the jury. Juror Deaton testified that at the time of the incident he felt the defendants were responsible for his being photographed and that if he returned a verdict of guilty, someone might harm him. None of the other jurors were called to testify even though Juror Deaton discussed the photographing incident with them. Therefore, the District Court did not inquire into any prejudice that might have affected the other jurors.

In Remmer v. United States, 347 U.S. 227 (1954), the Supreme Court ruled that, during the trial of a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror about a matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial. In Remmer, one of the jurors was approached by a third party who informed him that he could profit by bringing a verdict favorable to the defendant. The juror reported this fact to the court which, in turn, informed the prosecuting attorney. As a result, the FBI was called in to investigate and an FBI agent questioned the juror involved. Neither the defendant, nor his attorney was informed of this episode until after the verdict had been returned. In addressing the problem of juror contact, the Court stated that, while the presumption of prejudice is not conclusive, the Government has a heavy burden to establish, after notice to and opportunity for hearing from defendant, such contact with the juror was harmless to the defendant. Id. at 229. The case was remanded to the trial court for a hearing to determine the effect, if any, the contact had on the jury and on the defendant's right to a fair trial.

In the present case, the Court's holding in Remmer was not complied with. By not questioning all of the jurors, the District Court failed to hold an adequate hearing to protect Petitioner's right to a fair trial. Since only one juror was questioned while all of the jurors were exposed to the contamination, the government did not meet its burden of establishing that the contact with the juror was harmless to Petitioner. A writ of certiorari should be issued for the Court

to examine the issue of whether Remmer requires that all jurors be examined in order for the government to establish that contact by an outside influence with one juror is harmless when the other jurors have knowledge of the contact.

III. The District Court violated Rule 605 of the Federal Rules of Evidence by testifying as a witness at the jury hearing.

At the hearing held on September 30, 1982, the District Court Judge testified as to his involvement in the incident between the F.B.I. and Juror Deaton. Petitioner's motion for Judge Britt to recuse himself was denied. Judge Britt testified about his participation in the photographing incident and his conversations with Juror Deaton. The District Court subsequently ruled that the juror contact was harmless.

Rule 605 of the Federal Rules of Evidence provides that the presiding judge may not testify as a witness in that trial. There are very few cases interpreting this rule. The Notes of the Advisory Committee make it clear that the Rule applies to hearings other than jury trials. The Notes point out that two of the dangers in permitting the presiding judge to testify in a non-jury matter are that it is questionable whether the judge can rule impartially on the weight and admissibility of his own testimony and whether he can avoid an involvement destructive of impartiality.

In the present case, the District Court weighed the credibility of the testimony, including that of its own, and

concluded that the jury contamination was harmless. A writ of certiorari should issue for this Court to consider whether the District Court's actions violated Rule 605 of the Federal Rules of Evidence.

CONCLUSION

Petitioner respectfully requests that the Court issue a writ of certiorari to consider the following issues:

Whether Rule 19 of the Rules of the United States Court of Appeals for the Fourth Circuit, which requires consolidation of briefs and oral argument, violated Petitioner's rights to due process and adequate representation of counsel; whether Petitioner was denied an adequate hearing to determine whether jury contamination denied him the right to a fair trial; and whether the District Court violated Rule 605 of the Federal Rules of Evidence by testifying as a witness at the jury hearing.

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UNITED STATES OF AMERICA, RESPONDENT

AFFIDAVIT OF SERVICE

Attorney, Edwin C. Walker, being duly sworn, deposes and says:

1. That I am a member in good standing in the North Carolina Bar.

2. That I am a member in good standing in the Bar of the Eastern District of North Carolina.

3. That I am a member in good standing in the Bar of the Fourth Circuit Court of Appeals.

4. That on January 11, 1984, I mailed a copy of the foregoing Petition for Writ of Certiorari to Respondent by depositing a copy of same in the United States Mail, first class postage prepaid, addressed to:

Solicitor General
Department of Justice
Washington, D. C. 20530

This the 11th day of January, 1984.

Edwin C. Walker

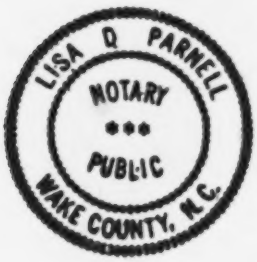
EDWIN C. WALKER
Counsel for Petitioner
19 W. Hargett Street
P. O. Box 127
Raleigh, North Carolina 27602
Telephone: (919) 832-2610

STATE OF NORTH CAROLINA

COUNTY OF WAKE

I, the undersigned, a Notary Public in and for said County and State, do hereby certify that Edwin C. Walker personally appeared before me this day and acknowledged the due execution of the foregoing Affidavit.

WITNESS my hand and notarial seal this the 11 day of January, 1984.



Lisa D. Parnell

NOTARY PUBLIC

My Commission Expires February 16, 1987

MY COMMISSION EXPIRES: _____

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFREY CRAIG BUMGARDNER, PETITIONER

v

UNITED STATES OF AMERICA, RESPONDENT

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-5274(L)

United States of America,

Appellee,

v.

Ronald Doyle Hines,

Appellant.

No. 82-5275

United States of America,

Appellee,

v.

Gary J. Peed,

Appellant.

No. 82-5276

United States of America,

Appellee,

v.

Teresa Eleazar,

Appellant.

No. 82-5277

United States of America,

Appellee,

v.

James Maurice Jackson,

Appellant.

No. 82-5278

United States of America,

Appellee,

v.

James C. Coddington,

Appellant.

No. 82-5280

United States of America,

Appellee,

v.

Jeffrey Craig Bumgardner,

Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, United States District Judge.

Argued: July 14, 1983 Decided September 9, 1983

Before PHILLIPS, SPROUSE and ERVIN, Circuit Judges.

William J. Sheppard (Elizabeth L. White on brief) and Gary S. Lawrence (Steven D. Kupferberg; Hugh Clifton Talton, Jr.; Christine Witcover Dean; Edwin C. Walker on brief) for Appellants; William E. Martin, Assistant United States Attorney (Samuel T. Currin, United States Attorney, Wallace W. Dixon, Assistant United States Attorney, James G. Lindsay, U.S. Dept. of Justice on brief) for Appellee.

ERVIN, Circuit Judge:

Ronald Doyle Hines, Gary J. Peed, Teresa Eleazar, James "Bubba" Jackson, James Coddington and Jeffrey Bumgardner appeal from the United States District Court for the Eastern District of North Carolina wherein they were tried for conspiracy to possess with intent to manufacture and distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and of using a communication facility to facilitate the cocaine conspiracy in violation of 21 U.S.C. § 843(b).

Viewing the evidence in the light most favorable to the government, the prosecution's case at trial established the existence of a two-tier conspiracy. The first tier was headquartered in Apex, North Carolina, under the command of James "Jacques" Provost. Jacques had two investors or partners in the first tier, Gary Peed of Virginia and James Coddington of Orlando, Florida. The first tier had three employees who acted as drug couriers, Jacques's son Darryl Provost, Peter Stisser, and Bubba Jackson. Darryl and Peter turned government witnesses and provided the crucial trial testimony against their co-conspirators.

The second tier was the smaller and local operation in Jacksonville, Florida, including Ronald Hines, Jeffrey Bumgardner and Teresa Eleazar. Contacts between the two tiers were made by Bubba Jackson, Eleazar's brother.

The jury found appellants guilty of both counts, except that Eleazar was acquitted on the telephone facilitation count. Peed, Coddington, and Jackson were sentenced to four years imprisonment plus five years probation. Hines, Eleazar and Bumgardner received six months imprisonment with five years probation.

On appeal, the appellants claim nine reversible errors in their trial. Finding no merit to any of the challenges, we affirm.

I.

In September, 1980, a double murder occurred in Jacksonville Beach, Florida. In July, 1981, two Jacksonville Beach police investigators, Officers Dorn and Maxwell, learned that "Bones" Merrill might have acted as a lookout during the murders. Bones was questioned and agreed to act as an informant in the investigation of Jacques Provost, who was suspected of having ordered the murders to avenge a delinquent drug debt and is now deceased.

Beginning on July 27, 1981, Bones made seven or eight consensually recorded phone calls from pay telephones in Jacksonville Beach to Jacques's home in St. Johns County, Florida, which was outside Dorn's and Maxwell's bailiwick. Since most of the information obtained concerned Jacques's ongoing drug operations, on July 29, 1981, the information was

turned over to Agent Alford of the Florida Department of Law Enforcement, an agency with statewide jurisdiction.

On August 29, Alford obtained an electronic surveillance warrant for Jacques's St. Johns County home. Alford eventually learned that Jacques had moved the center of his drug operations to a house in Apex, North Carolina.

Alford passed the information on to Agent Johannesen of the Federal Drug Enforcement Agency ("DEA") in Raleigh, North Carolina. Johannesen used the information to obtain a wiretap on Jacques's telephone in Apex from September 29, 1981 to October 14, 1981. Information developed from the wiretap led to the indictments of the appellants.

Appellants complain that the Apex wiretap evidence should have been suppressed because it was the fruit of the Florida consensual monitoring and electronic surveillance, which appellants contend were illegal. See Wong Sun v. United States, 371 U.S. 471 (1963). The consensual monitoring allegedly was illegal because officers Maxwell and Dorn were operating outside their jurisdiction. Appellants challenge the electronic surveillance on the grounds that it was issued based on an affidavit that contained intentional, reckless, and material misrepresentations.

Appellants contend that Maxwell and Dorn, Jacksonville Beach police officers, acted outside their jurisdiction by consensually monitoring Bones's nine pre-August

6, 1981 calls to Jacques's St. Johns County home. Maxwell and Dorn were not deputized in St. Johns County until August 6, 1981. Appellants rely on Wilson v. Florida. 403 So.2d 982 (Fla. 1980), in which Lake City, Florida, police officers conducted an investigation into Wilson's possession of drugs outside the municipal limits of Lake City. In conducting the investigation, the officers employed an electronic listening device that was hidden on an informant who purchased drugs from Wilson outside Lake City. The court held that fruits of the electronic surveillance could not form the basis for the issuance of a search warrant because the officers were without authority to conduct the investigation.

Wilson, however, is distinguishable from the present case. In Wilson, the investigation was into the possession of contraband outside Lake City. The Wilson court indicated, 403 So.2d at 984, that it would have reached a different result had the investigation been into Wilson's illegal acts within Lake City: "a municipal police officer . . . may conduct investigations outside the city limits . . . where the subject matter of the investigation originated inside the city limits, State v. Chapman, 376 So.2d 262 (Fla. 3d DCA 1979); Parker v. State, 362 So.2d 1033 (Fla. 1st DCA 1978)." Here, the subject matter of the investigations, the 1980 double murder in Jacksonville Beach, did originate within the city limits.

Of the nine pre-August 6 telephone calls, the first seven or eight were made from Jacksonville Beach, so Maxwell and Dorn were within their jurisdiction. Furthermore, since Dorn and Maxwell brought agent Alford, who had statewide jurisdiction, into the investigation on July 29, the monitoring of Bones's calls from Jacksonville were under the direction of Alford; i.e the officers acted "under color of law," 28 U.S.C. § 2511(2)(C), or "under the direction of a law enforcement officer," Fla. Stat. 934.03(2)(c).[1] Thus, the pre-August 6 calls comply with both the federal and state consensual monitoring statutes.[2]

---

1 18 U.S.C. § 2511(2)(C) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

Fla. Stat. 934.03(2)(c) provides:

> It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

2 It is unnecessary to decide the government's claim that

Appellants contend that the application of agent Alford for the Florida wiretap contained material misrepresentations which were intentionally and recklessly made and which were necessary to the finding of probable cause and, thus, that the Florida wiretap evidence was illegally seized under Franks v. Delaware, 438 U.S. 154 (1978). The alleged misrepresentations are that (1) Bones was a collector of drug debts for Jacques, (2) Bones revealed that Jacques imported drugs and was putting together an airplane scheme involving 15 kilograms of cocaine, (3) Jacques told Bones that he had some "heavy business", wanted Bones to work for him, and was meeting with some business associates to plan a large transaction, (4) Bones and Jacques discussed the details of a trip down south, (5) Jacques told Bones that he was waiting for a phone call and

---

the Jacksonville monitoring was valid because Dorn and Maxwell were "special deputies" in Jacksonville. Fla. Stat. § 30.08(4)(B) permits special deputies to conduct investigative work. The district court did not decide the question, but simply stated that "the officers may have had special deputy status [within Jacksonville] and, if so, the Jacksonville calls would have been within their jurisdiction."

We also do not reach the government's argument that the appellants have no standing since none of them had possession or privacy interests in the consensually monitored telephone calls and none of the conversations involved any of the appellants; i.e, they were neither victims nor targets of the consensually monitored calls. See 18 U.S.C. § 2510(11); Alderman v. United States, 394 U.S. 165 (1969). The district court did not address the argument and it is not clear whether it was raised below.

would know more after he received it, and (6) Darryl Provost told Bones that there was a change of plans and Bubba Jackson was going up north to collect some money.

Our review of the record, however, indicates that the alleged misrepresentations either did not occur or were immaterial: (1) during an August 3, 1981 interview of Bones by Maxwell and Dorn, Bones indicated that he collected drug debts in New York and Atlanta for Jacques; (2) during the August 3 interview, Bones and the officers discussed the plane deal; (3) while Jacques did not say he had some "heavy" business, he did say "I got two business people with me" who are "real business" people and "...h man, if you could see all the [stuff] that Mike and Bang put me in its unbelievable," and arranged for Bones to come to Jacques's home to discuss work; (4) Jacques told Bones on July 30, 1981 that "I was thinking of sending you with [Darryl] down south" and "I don't know what time you guys be leaving, but I would around twelve"; (5) although Jacques did not say he was waiting on a phone call, he did tell Bones that for the moment he had nothing for Bones to do, but that he was "waiting for somebody to be here" so Bones should call back "around supper,"; and (6) Bones's telephone call of August 1 and August 5 interview, when read together, indicate that Jackson had traveled north and Jacques was waiting for him to bring back some money. Not only are there no material misrepresentations, but there is no indication that the minor

inaccuracies were intentional or reckless. Thus, the Florida wiretap evidence was not illegally seized under Franks.

II.

The Interstate Agreement on Detainers Act ("IAD") provides that if trial is not held within 120 days of the date a prisoner arrives in a receiving state, the charges are to be dismissed with prejudice. 18 U.S.C. Appx. Art. IV(C), V(C). The running of the 120-day limitation, however, may be tolled by the district court "for good cause shown in open court, the prisoner or his counsel being present." Id.

The government brought Bubba Jackson to North Carolina for trial from Florida, where he was in custody, by detainer. The 120-day limitation began running on April 13, 1982, the date Jackson arrived in North Carolina. See United States v. Bryant, 612 F.2d 806, 810-11 n.7 (4th Cir.), cert. denied, 446 U.S. 920 (1980). The trial commenced on August 24, 1982, 133 days later. The parties dispute whether the running of the 120-day limitation period was tolled for at least 13 days.

In United States v. Odom, 674 F.2d 228, 230 (4th Cir.), cert. denied, 102 S.Ct. 2946 (1983), this court held that a defendant waives the 120-day limitation by requesting to be treated in a manner inconsistent therewith. The Odom court also held that the periods excluded under the Speedy Trial Act, see 18 U.S.C. § 3161(h)(1)(F) (e.g., period from filing to

disposition of pretrial motion) likewise should be excluded under the IAD. Thus, the government seeks to exclude all days from the filing of pretrial motions to the prompt disposition of those motions, since on April 26 Jackson moved the court to allow him to adopt the motions of his co-defendants. Hearings alone on these pretrial motions took 16 days (May 20-31, June 11-12, June 21-22). Indeed, in rejecting Jackson's motion for dismissal under the IAD, the district court found that Jackson's joining in the motion to suppress the wiretap evidence, without more, amounted to a waiver of the 120-day limitation.

> Of critical importance in the instant situation are defendant Jackson's motion to suppress evidence seized as a result of various electronic surveillances. Had the motion to suppress been allowed, it is doubtful that the government could have proceeded to trial since its case was based almost entirely upon this evidence. At least forty-seven days were required by the Magistrate to consider fully and make a recommendation concerning these motions to suppress. Since the trial commenced thirteen days after the running of the 120-day limitation, the 47-day delay caused by defendant Jackson's motions to suppress provides sufficient justification for the denial of defendant Jackson's motion to dismiss based upon the Interstate Agreement on Detainers.

The government also lists several continuances (i.e., requests to be treated inconsistently with the IAD) granted at Jackson's request: (1) at the request of Jackson's attorney, a pretrial hearing was delayed three days from June 7 to June 10;

(2) the June 10-12 hearings were continued nine days until June 21 at the request of all attorneys, including Jackson's; (3) at Jackson's attorney's request, defense counsel were given ten days, from June 22 until July 2 to file additional memoranda; and (4) Jackson's attorney, as well as other defense counsel, indicated that the clerk's suggested trial date of July 19 was not satisfactory, and the trial eventually was set for August 16.

Jackson attacks the government's assertion that he sought continuances. He cannot, however, rebut the government's claim that he sought an additional ten days to file memoranda or that he indicated that a July 19 trial date was unsatisfactory. Furthermore, even without considering the continuances, Jackson must be deemed to have waived the 120-day limitation by joining in the co-defendants' motions, especially the motion to suppress the wiretap evidence.

It is not surprising that Jackson was held beyond 120 days given defense counsel's extensive pretrial motions. Jackson joined in those motions, which took a substantial amount of time to resolve, and then surprised the district court by moving for a dismissal under the IAD on the first day of trial. Jackson sought to benefit from the pretrial motions which necessarily resulted in delays, and cannot now claim that he is aggrieved under the IAD by those delays.

III.

Appellants argue that the indictment did not charge possession of a controlled substance listed under 21 U.S.C. § 812 Sched. II, and that the government failed to prove possession of a § 812 Sched. II controlled substance. The arguments are meritless.

The indictments charge a conspiracy to possess with intent to distribute "a schedule II narcotic controlled substance, to-wit: cocaine, in violation of the provisions of 21 United States Code, § 841(a)(1)." Appellants note that possession of some cocaine isomers is legal and conclude that the use of the single word "cocaine" makes the indictment insufficient. The argument ignores the placing of "cocaine" in apposition to the phrase "a schedule II controlled substance." The indictment thus clearly contains a sufficient description of the "controlled substance" element of the offense.

Appellants claim that the government failed to prove that the cocaine here was the illegal kind of cocaine that is a controlled substance under 21 U.S.C. § 812 Sched. II. Appellants point out that the government's expert testified that the seized substance was "cocaine" but that it was not a "narcotic." Since the statutory definitions of the narcotic cocaine and controlled substance cocaine are similar, see 21 U.S.C. §§ 802(16), 812 Sched. II.(a)(4), appellants conclude

that the evidence was consistent with a conspiracy to distribute the legal kind of cocaine.

The government's expert, however, was unequivocal that the seized cocaine was a controlled substance within the meaning of 21 U.S.C. § 812 Sched. II. Her statement that in chemical terms cocaine is "a stimulant or basic euphoriant," but not a "narcotic" did not affect her conclusion that the seized cocaine was a controlled substance within the meaning of 21 U.S.C. § 812 Sched. II. Furthermore, she stated only that cocaine chemically is not a narcotic, not that cocaine is not a narcotic as defined in 21 U.S.C. § 802(16). Moreover, the offense charged, violation of 21 U.S.C. § 841(a), requires proof of "possess[ion] with intent to manufacture, distribute, or dispense, a [§ 812 Sched. II] controlled substance." Whether cocaine is a narcotic within the meaning of 21 U.S.C. § 802(16) was irrelevant to the determination of guilt or innocence.[3]

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[3] Thus, the trial court instructed the jury that whether cocaine is a narcotic is

> not material to the guilt or innocence of any of the defendants in the charges as contained in the Bill of Indictment. Therefore, it is not necessary for the government to prove that the substance referred to in the indictment was a narcotic.
>
> I instruct you that cocaine is a Schedule II controlled substance. It is a

IV.

Out-of-court statements by co-conspirators made "during the course of and in furtherance of the conspiracy" are not hearsay and are admissible. Fed. R. Evid. 801(d)(2)(E). Their admissibility turns on "the existence of substantial evidence of the conspiracy other than the statement itself." United States v. Dockins, 659 F.2d 15, 16 (4th Cir. 1981). Whether such evidence exists is a question for the trial judge. Fed. R. Evid. 104; United States v. Jones, 542 F.2d 186, 203 n.33 (4th Cir.), cert. denied, 426 U.S. 922 (1976).

Appellants, relying on the Fifth Circuit decision in United States v. James, 590 F.2d 575 (5th Cir.), cert. denied, 442 U.S. 917 (1979), argue that it was error for the trial court here not to hold a hearing to determine the existence of the conspiracy before any of the co-conspirator statements were admitted in the case-in-chief. This court, however, does not require the James hearing. Instead, a trial judge retains the option to admit conditionally the declarations of co-conspirators before the conspiracy has been independently

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violation of the laws of the United States for two or more persons to conspire or join together in an agreement to commit an offense in violation of the laws of the United States relating to cocaine.

established, subject to the subsequent fulfillment of that factual predicate. United States v. McCormick, 565 F.2d 286, 289 n.5 (4th Cir.), cert. denied, 434 U.S. 1021 (1978). The district court safeguards the defendant's rights by being prepared either to declare a mistrial or to dismiss the case if the government fails to prove aliunde that a conspiracy existed. Here, that declaration was unwarranted since the existence of a conspiracy was proved by a preponderance of the independent evidence. Indeed, appellants do not challenge the district court's finding that there was sufficient independent evidence of the conspiracy among Coddington, Jackson, and Peed. Rather, they claim a lack of independent evidence that Eleazar, Bumgardner, and Hines were part of that conspiracy. Our review of the evidence, however, indicates otherwise. The recorded conversations of Bumgardner, Hines and Eleazar with Jackson, the go-between of this two-tiered conspiracy, are replete with references by them to their cocaine dealings. See Fed. R. Evid. 801(d)(2)(4). Although Eleazar made only two comments during those calls, one comment -- "Ronnie got all that stuff" -- apparently informed Jackson that a cocaine delivery had been accomplished and she admitted sending money, which other evidence indicated was in payment for drugs, under a false name to Jackson. This independent evidence was sufficient to establish their participation in the two-tier conspiracy.

V.

During the course of the trial, evidence of appellants' bad acts other than the cocaine conspiracy was introduced: (1) Stisser testified that he delivered cocaine to Coddington on a date subsequent to the period of the conspiracy charged; (2) references were made to marijuana dealings before the inception of the cocaine conspiracy; (3) Darryl Provost and Stisser testified that they dealt in quaaludes with Jacques Provost; and (4) Eleazar testified that Jackson was a bond jumper. Appellants argue that they were unfairly prejudiced by the other acts evidence because (1) the consideration of such evidence was not limited to the defendants involved in the acts, thus allowing the government to prove guilt by association, and (2) the evidence was inadmissible under Fed. R. Evid. 404 as allowing the government to prove guilt by bad character.

While other bad acts evidence is not admissible to show the character of the accused, it is admissible to show motive, intent, absence of mistake, and the like. Fed. R. Evid. 404(b). Thus, the district court here instructed the jury:

> [I]f you, the jury, should find beyond a reasonable doubt, from other evidence in the case, that the accused did the acts charged in this indictment, then the jury may consider evidence as to some other act of a similar or like nature, on the part of the accused, in determining the state

> of mind or intent, with which the accused did the act which is charged in the indictment. And where proof of an alleged similar act, done at some other time or place, is clear and conclusive, the jury may, but is not obligated to, draw the inference and find that in doing the act charged in this indictment, the accused acted wilfully and not because of mistake or accident or other innocent reason. (emphasis added).

Not only did that instruction limit the jury's consideration of the other acts evidence to proof of wilfullness or absence of mistake, but it also limited consideration to the particular accused who performed the other act.

Furthermore, the specific other acts evidence admitted satisfied Rule 404(b) and the probativeness-prejudice balancing requirement of Rule 403. Stisser testified that he delivered cocaine to Coddington in late October, several weeks after the conspiracy alleged in the indictment. Nevertheless, this court has held that "subsequent conduct may be highly probative of prior intent." United States v. Hadaway, 681 F.2d 214, 217 (4th Cir. 1982). The probativeness is especially great here given the closeness in time -- several weeks -- of the similar acts.

Although the marijuana conspiracy counts were severed before trial on the grounds that "evidence concerning the marijuana conspiracy may very well be prejudicial to the defendants not charged in those counts," that does not automatically require a finding of unfair prejudice because of

the limited references to marijuana dealings in the cocaine trial. Presumably, if the counts had not been severed, a significantly higher quantity of evidence concerning the marijuana conspiracy would have been introduced, thereby increasing the possibility of prejudice. Here, the limited references to marijuana dealings in order to show intent concerning the cocaine dealings were proper under Rule 404(b). See United States v. Bruqman, 655 F.2d 540, 543-45 (4th Cir. 1981) (evidence concerning marijuana and hashish dealings admissible under Rule 404(b) on charge of cocaine conspiracy). The same reasoning applies to the references to quaalude dealings.

While Eleazar's testimony about Jackson being a bond jumper was not admissible under Rule 404(b), the evidence was elicted by Eleazar's defense counsel, not the government, and immediately struck by the district court as inadmissible hearsay with the instruction to the jury to disregard it. We discern no reversible error in the district court's handling of the inadmissible testimony. See United States v. Johnson, 610 F.2d 194, 197 (4th Cir.), cert. denied, 446 U.S. 911 (1980), ("[a]bsent . . . misconduct on the part of the government counsel, the courts generally have discerned no reversible error where the trial court has acted promptly in sustaining an objection and advising the jury to disregard the testimony).

VI.

The government bears the burden of proving the single conspiracy it charged in the indictment. On appeal, this court must determine whether the evidence, when viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), supports the jury's finding of a single conspiracy. If not, reversal is required only where proof of the multiple conspiracies prejudiced the defendants' substantial rights. United States v. Coward, 630 F.2d 229, 231 (4th Cir.), cert. denied, 456 U.S. 946 (1982).

Appellants argue that their convictions were flawed because the government proved ten conspiracies instead of the single conspiracy charged. Appellants view the evidence as showing a wheel conspiracy with Peed, Coddington, and Jackson at the center and Hines, Eleazar, and Bumgardner as one of the spokes. Since the government did not show that Hines, Bumgardner, and Eleazar knew of the other spokes in the conspiracy, the three could not be considered members of the overall wheel conspiracy. Absent proof of such knowledge, the evidence shows numerous separate conspiracies (i.e, unrelated spokes). We cannot agree.

Viewing the evidence in the light most favorable to the government, a two-tiered conspiracy was shown. The first level included Peed, Coddington, and Jackson and the second included Bumgardner, Hines, and Eleazar. Jackson was the link between the two tiers. The first tier was the wholesaler and

the second the retailer. This chain conspiracy is not unlike other multi-level schemes that have been found to constitute a single conspiracy. See United States v. Agueci, 310 F.2d 817, 826 (2d Cir.), cert. denied, 272 U.S. 959 (1963) (chain narcotics distribution conspiracy extends several levels from importation through selling of drugs to user). This would be a different case if the government attempted to charge retailers, i.e., other spokes, other than Bumgardner, Hines, and Eleazar. Here, however, the evidence clearly shows that those three were part of a single retail operation.

The government proved at most two conspiracies, separate wholesale and retail conspiracies.[4] Nevertheless, proof of those two separate conspiracies would not have prejudiced appellants under Coward since the jury would not have been confused into imputing guilt to members of one conspiracy because of the illegal activities of the other conspiracy. With only two conspiracies, each at a distinct level, and simple in operation, the jury was not likely to confuse evidence concerning one level as being relevant concerning the other. Cf. Kotteakos v. United States, 328 U. S. 750 (1946) (proof of separate conspiracies with numerous defendants where conspiracies complex amounts to prejudice).

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[4] That view of the evidence requires disregarding the substantial evidence that Jackson linked the two levels.

VII.

Agent Johannesen testified at trial against Jackson. His trial testimony accurately reflected the dollar amount and quantity of a certain transaction involving Jackson. Before the grand jury, Johannesen had overstated the dollar amounts and quantity. In order to impeach Johannesen's testimony, Jackson's attorney sought to introduce the entire written grand jury testimony of Johannesen. When Coddington's counsel objected to the introduction of the entire written testimony on the grounds of irrelevancy, the district court limited Jackson's attorney to introducing the inconsistent statements by having Johannesen read to the jury his prior inconsistent statements. Jackson now argues that the limitation was error and the written transcript should have been submitted to the jury. The argument is frivolous. The district court did not abuse its discretion. The jury was made aware of the prior inconsistent testimony and protected from other irrelevant (and perhaps prejudicial) evidence in Johannesen's grand jury testimony.

VIII.

Eleazar and Hines argue that the evidence is insufficient to support their convictions. Viewing the evidence in the light most favorable to the government, however, the evidence is sufficient to support both convictions.

Most of Jackson's calls were made to Eleazar's telephone in Florida. During one call, Eleazar indicated that a cocaine delivery involving Hines had been accomplished. Later during that conversation, Bumgardner informed Jackson that Eleazar "went by and picked it up," the "it" meaning cocaine." In another conversation, Eleazar told Jackson, "Bumgardner needs to talk to you," whereupon Jackson and Bumgardner proceeded to discuss a cocaine deal. Eleazar also sent money to Jackson, under instructions to use a false name, and evidence indicated that the money was in payment for drugs. Although Eleazar offered her own version of events, the jury apparently did not accept her story, and viewing the evidence favorably toward the government, her conviction must stand.[5]

Ronald Hines claims a lack of proof as to his identity as a participant in the conspiracy because he was not identified pursuant to Fed. R. Evid. 901(b)(6). That rule allows "[b]y way of illustration only" identification of a telephone caller by evidence that the call was made to a number assigned to him. Hines claims that the proof of his identity was inadequate because "the called party only identified

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[5] The verdict of not guilty on the use of the telephone count is not inconsistent because the jury could have convicted her on the conspiracy count for picking up the drugs, and sending the money, which did not involve her use of the telephones.

himself as 'Ronnie'. The number . . . is not subscribed to by a Ronnie." Hines also points out that there is no proof that he was at the residence at the time of the call. Nor was the recorded voice identified as his. His argument is completely without merit.

Not only did the conversant identify himself as "Ronnie," but the phone was registered in the name of his parents and Hines was at the house when a DEA investigator visited the house. That evidence is sufficient to establish Hines's identity as the conversant.

IX.

One day during the trial, an FBI agent photographed persons leaving the courthouse and was noticed by juror Denton. Juror Denton advised the court and was informed that the photographs were not being made of jurors, that there was no cause for concern, and that the matter should be disregarded. At a post-trial hearing on the possible prejudicial influence of the picture-taking episode, juror Denton indicated that after receiving the court's assurances, he was not concerned about the photographing and the incident did not affect his deliberations. Nor was the incident further discussed by him or the other jurors after he conveyed the court's assurances to the other jurors. The district court considered Denton's testimony credible and found that the episode had no prejudicial influence on the jury. That finding is not clearly

erroneous. Under Smith v. Phillips, 455 U.S. 209 (1982), and Remmer v. United States, 350 U.S. 377 (1956), appellants were entitled to a hearing, which they received, on the possible prejudicial impact of the episode. Absent a showing that the district court's finding of no unfair prejudice was clearly erroneous, we cannot reverse.

X.

For the foregoing reasons, the convictions are

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-5274

United States of America,

Appellee,

versus

Ronald Doyle Hines,

Appellant.

No. 82-5275

United States of America,

Appellee,

versus

Gary J. Reed,

Appellant.

No. 82-5276

United States of America,

Appellee,

versus

Teresa Eleazer,

Appellant.

No. 82-5277

United States of America,

Appellee,

versus

James Maurice Jackson,

Appellant.

No. 82-5278

United States of America,

Appellee,

versus

James C. Coddington,

Appellant.

No. 82-5286

United States of America,

Appellee,

versus

Jeffrey Craig Bumgardner,

Appellant.

O R D E R

Upon consideration of the appellants' petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Ervin for a panel consisting of Judge Phillips, Judge Sprouse, and Judge Ervin.

For the Court

/s/ William K. Slate, II

CLERK

FILED

NOV 14 1983

U. S. Court of Appeals
Fourth Circuit

FILED
OCT 13 1982
U. S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-5274(L)

United States of America,

Appellee,

versus

Ronald Doyle Hines,

Appellant.

No. 82-5275

United States of America,

Appellee,

versus

Gary J. Peed,

Appellant.

No. 82-5276

United States of America,

Appellee,

versus

Teresa Eleazer,

Appellant.

No. 82-5277

United States of America,

Appellee,

versus

James Maurice Jackson,

Appellant.

No. 82-5278

United States of America,

Appellee,

versus

James C. Coddington,

Appellant.

No. 82-5286

United States of America,

Appellee,

versus

Jeffrey Craig Bumgardner,

Appellant.

Appeals from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, District Judge.

Pursuant to Local Rule 19, IT IS ORDERED that:

1. the above cases are consolidated for the purpose of briefing and oral argument;

2. only one brief shall be permitted to a side;

3. all parties to a side shall share the time allowed for argument by the Federal Rules of Appellate Procedure;

4. each side shall notify the Court, within ten days of this order, of the attorney who has been designated as lead counsel.

For The Court - By Direction

William K. Slate II
CLERK

FILED
NOV - 8 1982
J. TICH LECHARD, CLERK
U. S. DISTRICT COURT
E. DIST. NO. CAR.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 82-8-CR-5

UNITED STATES OF AMERICA)
)
v.) ORDER
)
JEFFREY CRAIG BUMGARDNER,)
et al.) Cl. Ct. #30, p. 153

This matter is before the Court on motion of defendants for a new trial based on an incident occurring during the trial involving the jury.

FACTUAL BACKGROUND

The trial was begun at 10:00 a.m. on 24 August 1982 with the selection of a jury consisting of twelve regular and two alternate members. On 25 August 1982, the jury was impaneled and the trial begun. During the course of the trial, the names of Costello Ramey and Doug Ross were mentioned as suppliers of drugs to the organization in which the defendants were involved. On 1 September 1982, Costello Ramey and Doug Ross were called as witnesses by one of the defendants and each took the fifth amendment. Court adjourned at 4:30 p.m. on that date, and shortly thereafter juror, Bryant Deaton, reported to Susan Umstead, law clerk for the presiding judge, that someone was taking pictures of jurors as they left the courthouse. Mr. Deaton was brought into the Judge's Chambers and, at that time, advised the Court that as he and some of the other jurors were leaving the main entrance of the courthouse an unidentified

individual sitting in a car parked at the curb in front of the courthouse appeared to be taking pictures of the jurors. Mr. Deaton further informed the Court that he had taken down the license number of the automobile. The Court, thereupon, took the slip of paper on which the license number was written down by the juror, advised the juror that he would look into the matter and excused him. Immediately thereafter, the Court requested an FBI agent to come to chambers. Agent Albert P. Koehler responded, and he was advised of the incident and requested by the Court to immediately investigate the matter and report back to the Court as promptly as possible.

At approximately 8:00 a.m. on 2 September 1982, Agent Koehler came to chambers and reported to the Court that the photographs were being taken by another FBI agent, James J. Roche, Jr., of the two suspected drug dealers, Ramey and Ross. When juror Deaton arrived at court, he was brought to chambers by Susan Umstead, law clerk for the presiding judge, at which time he was advised that the Court had ascertained the identity of the photographer. The Court further assured the juror that photographs were not being made of jurors, that there was no cause for concern by him or any other juror, and that he should disregard the incident entirely. The Court further advised juror Deaton that the Court was not at liberty to discuss the matter further at that time but could possibly do so at some later date.

On 3 September 1982 at 10:00 a.m., the jury retired to begin its deliberations. At 7:23 p.m. the jury returned

its verdict. Before leaving the courtroom, juror Deaton inquired of the Court further concerning the picture-taking incident. The Court again advised juror Deaton that it was not at liberty to discuss the matter further at that time but would, at a later date should he make further inquiry. The jury was then discharged and the Court advised the parties of the incident and what had transpired thereafter.

Motions for a new trial based on alleged prejudice resulting from the picture-taking incident have been filed by all defendants. On 30 September 1982, a hearing was conducted at which time Agents Koehler, Roche and Susan Rowley, who was in the automobile with Agent Roche at the time of the incident, and juror Deaton testified. All were examined initially by the Court and all defense counsel were given an opportunity to question the witnesses.

CONTENTIONS OF THE DEFENDANTS

The defendants contend first, that the Court erred in not bringing the matter to their attention at the time it occurred and conducting a hearing involving one or more of the jurors and secondly, that the cause of the defendants was prejudiced by the incident. Defendants principally rely on Remmer v. United States, 347 U.S. 227 (1954) and Smith v. Phillips, ____ U.S. ____, 71 L.Ed.2d 78 (1982).

DECISION

The presence of cameras of all varieties in and about the courthouse is an everyday occurrence. In the Eastern District of North Carolina, the taking of photographs in the courtroom,

court offices, or in corridors immediately adjacent thereto is prohibited by local rule. Local Rule 8.00, E.D.N.C. The courtroom in the Raleigh Courthouse is located on the seventh floor of the Federal Building. Although the local rule prohibits the taking of photographs on the seventh floor, it is not unusual for photographers to be stationed in the lobby where the elevators empty and out in front of the courthouse. Thus, the taking of photographs of participants in a court proceeding if not an everyday occurrence is, at least, not an unusual occurrence.

Remmer involved a situation where a remark had been made to a juror during trial that the juror could profit by bringing in a verdict favorable to the defendant. Smith involved a situation where a juror had made application for employment in the prosecuting attorney's office while serving as a juror in the case. Other cases brought to the attention of the Court or disclosed by its own research involve contact with or by a juror. None have been found in which it has been contended that the jury was prejudiced because of an event not directly involving a member of the jury panel.

The Court's concern at the time of the incident was first, to determine who the photographer was and second, to alleviate any fears on the part of the juror that there was any threat to his safety or well-being. Both of these objectives were accomplished with a minimum of effort and without disruption of the trial. When questioned, juror Deaton testified that he had no apprehension or concern for his safety. He further testified that the incident did not in any way affect his delibe-

rations or decision as a juror and that he felt that it did not in any way affect the decision of the other jurors. He specifically testified that after the Court assured him there was nothing to be concerned about that the matter was not mentioned by him or any of the jurors again.

The burden is on defendants to show bias on the part of the jury. Smith v. Phillips, supra. This they have failed to do.

Defendants contend that the Court should have required all of the jurors to be brought in as witnesses and subjected to examination by the Court and cross-examination by the attorneys. The Court disagrees, finding that the testimony of the juror Deaton is highly credible and believable, that the incident was not mentioned again during the course of the trial or jury deliberations. That being true, it is inconceivable to the Court that any of the other jurors, not directly involved in the incident, could have been prejudiced or influenced in any way.

The motions for new trial are denied.

AND IT IS SO ORDERED.

This 8 November 1982.

W. EARL BRITT
United States District Judge